MAYER | BROWN

June 2019

Legal developments in construction law

1. Court of Appeal sets out red line on lawful act duress

A key ingredient of economic duress is illegitimate pressure but can a threat to do something lawful amount to economic duress? An airline gave notice to its agents of termination of their contracts for the sale of flight tickets and offered new contracts, but only on condition that the agents waived their existing claims. The claimant was very largely dependent on the ability to sell the airline's tickets and had no practical alternative to accepting the terms offered if it wished to remain in business. It accepted but subsequently claimed that this was a case of lawful act duress. But was it?

No, said the Court of Appeal. The doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes, in good faith, it is entitled, whether or not, objectively, it has reasonable grounds for that belief. Common law and equity set tight limits to setting aside otherwise valid contracts and, in this way, undesirable uncertainty in a commercial context is reduced.

The Court appreciated that, in the case in question, which concerned the reasonableness of the grounds for resisting a claim, it could be said that a test of unreasonableness is not uncertain, because it could be tested and decided according to conventional legal standards. But that will not be the case in the much more common situation of a party using lawful commercial pressure in support of a purely commercial demand. There is no yardstick by which to judge such demands, other than those that can be set out in legislation such as that applying to consumer contracts. Such demands are a matter of negotiation against the background of the pressures on both parties.

And the relevant considerations go beyond uncertainty. In judging the use, or threat, of lawful acts as commercial pressure, there is a sharp distinction between demands made in good faith and in bad faith. A contracting party's lack of good faith is a feature in a number of the grounds on which contracts may be avoided, for example, rescission for fraudulent misrepresentation or of an unconscionable transaction. It is a clear criterion involving conduct which all can agree is unacceptable and which is a fact capable of proof, often, as it happens, by reference to the lack of any reasonable grounds for the belief. By contrast, not only is reasonableness in this context a standard of very uncertain content but it is also very unclear why, or on what basis, the common law should hold that a party with a private law right, whose exercise is not subject to any overriding duty, cannot use it to achieve a purpose which is both lawful and advanced in good faith.

Times Travel (UK) Ltd v Pakistan International Airlines Corporation (Rev 2) [2019] EWCA Civ 828

2. P.I. insurance: Court of Appeal looks at notification of circumstances and "cans of worms"

Having professional indemnity insurance is rather important. So is notifying insurers in time to secure the protection of the policy. And the policy terms may require notification as soon as possible after becoming aware of circumstances reasonably expected to produce a claim (or words to that effect). But what does such a clause actually require?

The Court of Appeal has confirmed the key legal principles applicable, in summary as follows:

- a deeming provision such as this is to be construed and applied with a view to its commercial purpose, to provide an extension of cover for all claims in the future which flow from the notified circumstances;
- a provision which refers to circumstances that "may" give rise to claims sets a deliberately undemanding test; there need only be a possibility of claims in future;
- a notification need not be limited to particular events; the insured may give a "can of worms" or "hornet's nest" notification; i.e. a notification of a problem, the exact scale and consequences of which are not known;
- although the insured had to be aware of circumstances that might reasonably be expected to produce a claim, that did not mean that the insured needed to know or appreciate the cause, or all the causes, of the problems which have arisen, or the consequences, or the details of the consequences, which might flow from them. Such a limitation would seriously reduce the value of claims made insurance;
- if there has been a proper notification of circumstances, any claim arising from those notified circumstances will be considered to have been made within the requisite period of insurance but there must be some causal, as opposed to merely some coincidental, link between the notified circumstances and the later claim;
- when construing a communication to determine whether it is, or its scope as, a notification, one applies conventional principles of interpretation;
- analysis of a notification clause involves the awareness of a circumstance, a pure matter of fact, and the characterisation of the circumstance as one which may give rise to a claim against the insured.

Euro Pools Plc v Royal & Sun Alliance Insurance Plc [2019] EWCA Civ 808 (13 May 2019)

3. CVA stops adjudication enforcement

The employer under a building contract did not serve a pay less notice in response to the contractor's interim payment notice. The sum applied for consequently became due, the contractor obtained an adjudication award in its favour and applied to enforce it. The contractor then entered into a Company Voluntary Arrangement (CVA). But would enforcement undermine the proper operation of the CVA?

The court ruled that it would. Since the adjudicator's decision did not determine the value of the contractor's claims or the value of any particular claim, but was in effect an order for an interim payment, it would have had no effect on the CVA setting-off exercise unless it had been complied with prior to the CVA. Had that happened, there would have been a payment made before the CVA which would form part of the parties' mutual dealings.

The existence of an unsatisfied adjudicator's decision prior to entering into the CVA was the significant factor distinguishing this case from previous cases. To order the employer to pay, after the CVA has been entered into, the sum determined by the adjudicator would distort the CVA accounting process, because the money would not be applied for the sole benefit of the employer but, instead, for the benefit of the creditors generally.

In addition, it would be distorted in a way that would always operate to the detriment of the employer, so that it would be wrong in principle to enforce the decision by ordering the employer to pay the contractor the sum found due. And if the judge was wrong on this issue, this was a case where the conclusions reached about the effect of ordering payment of the sum found due would amount to special circumstances under CPR 83.7(4)(a) so as to justify staying enforcement of the full amount.

Indigo Projects London Ltd v Razin & Anor [2019] EWHC 1205

4. JCT publishes BIM Practice Note

JCT has published a practice note 'BIM and JCT Contracts' which provides guidance on using JCT contracts on projects where BIM is to be used. The aim of the note, which focuses on the use of BIM with the JCT Design and Build Contract, is to:

- further understanding of BIM-related legal and contractual issues and suggest ways of approaching such issues in a collaborative and constructive way;
- provide practical, clear guidance to project participants and their professional advisers.

See: https://www.jctltd.co.uk/product/bim-and-jct-contracts

5. High street planning restrictions axed

The government has amended permitted development rights to enable retail, takeaways, betting shops, payday loan shops and launderettes to change to office space without the need for a full planning application. To help deliver a greater mix of uses on the high street, the changes also allow the temporary change of use from high street uses such as shops, offices, and betting shops, to certain community uses such as a library or public hall

The amended regulations came into force on 25 May 2019.

See: https://www.gov.uk/government/news/housing-minister-announces-boost-for-families-and-high-streets-as-planning-red-tape-is-axed; and

https://www.legislation.gov.uk/uksi/2019/907/made

6. CIC consults on low value disputes adjudication procedure

The Construction Industry Council is developing a Low Value Disputes Model Adjudication Procedure to provide a simple and cost-effective procedure to make adjudication more accessible for SMEs and others involved in lower value claims.

The procedure is aimed at disputes where claims are for £50,000 or less and the issues in dispute are relatively uncomplicated and it is being developed by a working group drawn from key industry bodies, including the Adjudication Society, CIC, CEDR, ICE and the RICS.

CIC wishes to consult with the construction industry and other stakeholders to give everyone the opportunity to make the procedure the best that it can be and to enable the CIC to gauge the degree of industry support for the initiative.

http://cic.org.uk/news/article.php?s=2019-06-04-cic-consultation-on-adjudication-for-low-value-disputes

If you have any questions or require specific advice on the matters covered in this Update, please contact your usual Mayer Brown contact.